Supreme Court, U.S.
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No. 02-947

In The Supreme Court of the United States

UNITED AIRLINES, INC. and UAL CORPORATION,

Petitioners,

v.

KATSUKO HOSAKA, individually and on behalf of the Estate and Heirs of Sadao Hosaka, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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REASONS FOR NOT GRANTING THE PETITION

I

THE ISSUE PRESENTED IN THE PETITION IS NOT RIPE FOR REVIEW BY THIS COURT AT THIS TIME

Petitioners United Airlines, Inc. and UAL Corporation represent to this Court that the decision herein, 305 F.3d 989 (9th Cir. 2002), is a question of recurring importance on which the circuits are in conflict. Petition at 5. Nothing could be further from the truth.

Petitioners point to two decisions by Circuit Courts of Appeals and one district court opinion. There is in fact exactly one appellate decision apparently at odds with the Ninth Circuit on the question presented here – whether a district court may refuse to retain jurisdiction in a Warsaw Convention case under the doctrine of *forum non conveniens* – and that conflict, as set forth below, does not justify this Court's review of the question.

The Fifth Circuit *en banc* decided *In re Air Crash Disaster Near New Orleans, LA on July 9, 1982*, 821 F.2d 1147 (1987), on what was at best a superficial and flawed analysis, fifteen years before the Ninth Circuit took the question up. In the meantime, the only other court to consider whether *forum non conveniens* was barred by the Warsaw Convention was Judge Sweet of the Southern District of New York, hearing the cases arising out of the crash of TWA 800. *In re Air Crash Off Long Island, New York, on July 17, 1996*, 65 F.Supp.2d 207 (S.D.N.Y. 1999). Both courts held that *forum non conveniens* could apply to Warsaw Convention (formerly known as Convention for the Unification of Certain Rules Relating to International

Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), reprinted in note following 49 U.S.C. § 40105) cases. Both courts denied the motion to dismiss. The Ninth Circuit case, therefore, is one of first impression.

Petitioners point to *Smith v. Canadian Pacific Airways*, 452 F.2d 798 (2d Cir. 1971) in support of their claim that the circuits are split on this question. *Smith* is inapposite, since it did not address *forum non conveniens*. *Smith* instead stands for the proposition that a Warsaw Convention plaintiff must establish subject matter jurisdiction under Article 28, personal jurisdiction over the carrier, and appropriate venue. None of that is relevant, since *forum non conveniens* presumes subject matter and personal jurisdiction. Indeed, those issues were not contested below.

The Fifth Circuit did not actually analyze the text of the Warsaw Convention, nor did it examine the drafting history of the Convention. Rather, it simply expressed its disbelief that the United States would adhere to the Convention with the understanding that *forum non conveniens* would thereby become unavailable. 821 F.2d at 1161-62. As the Ninth Circuit pointed out, that disbelief was historically inaccurate. 305 F.3d at 999. Judge Sweet, having been presented with the drafting history, concluded that there was no reason for a United States court not to invoke *forum non conveniens* under Article 28(2). 65 F.Supp.2d at 214.

At present, there is one Circuit Court of Appeals' decision that simply holds that *forum non conveniens* is available under Article 28(2), and another that holds that the district court may not, through Article 28(2), negative the plaintiff's election under 28(1). The two opinions are separated by fifteen years. As set forth below, there was

good reason for the Ninth Circuit to reconsider the question.

In view of the Ninth Circuit's conclusions, it would be more appropriate for this Court to decline the petition and wait for the issue to arise again, in a different circuit. That court would then have to consider the Ninth Circuit's reasoning. Whether it agreed with the Ninth Circuit or not, there would be a fuller discussion of the issues and more justification for review by this Court, if that were appropriate. Because this is a fairly abstruse question, presenting a narrow issue of the interpretation of the Warsaw Convention, it should be allowed fuller consideration in the circuits before this Court takes the matter up, if at all. For these reasons, the petition should be denied.

II

THE NINTH CIRCUIT WAS RIGHT ON THE MERITS

There is no reason for this Court to review the question presented at this time. As pointed out above, Petitioners' claim that this is a question of recurring importance on which the circuits are split is at best an exaggeration. Even if that were not so, the Ninth Circuit's decision is clearly correct on the merits and should not be disturbed.

The Ninth Circuit in 2002 faced a different question from the one presented to the Fifth Circuit in 1987. The nub of this controversy is the relationship between Article 28(1) and 28(2):

> (1) An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before

> the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.
>
> (2) Questions of procedure shall be governed by the law of the court to which the case is submitted.

Warsaw Convention, art. 28. *Forum non conveniens* has been repeatedly characterized as a "procedural tool" available to district courts. Judge Sweet suggested that, while it results in a dismissal, that dismissal is conditional and therefore *forum non conveniens* is like a transfer. 65 F.Supp.2d at 212-13. Respondents respectfully disagree with this characterization. *Forum non conveniens* is not "procedure" in the sense intended by Article 28(2). It has nothing to do with how the case progresses in the court. It is dispositive. It results in dismissal, and the case is over. Even if the dismissal is framed as "conditional," on the assumption that the country presumably more "convenient" may not accept the case, this cannot be in a Warsaw Convention situation. A Warsaw Convention case can only be transferred to a High Contracting Party, and every High Contracting Party is committed to keeping the case, in accordance with the settled rules of Article 28. In short, there is no *forum non conveniens* in any other High Contracting Party. In *Milor S.R.L. v. British Airways PLC*, [1996] Q.B. 702 (1996), the United Kingdom has rejected *forum non conveniens*, and other common law countries that look to U.K. law for guidance will likely find the Court of Appeal's ruling persuasive; civil law countries, of course, do not know the doctrine. Therefore, any other High Contracting Party would be unable to refuse the case and return it to the United States under any of the conditions set

by a district court in granting such a *forum non conveniens* motion.

Whether or not Judge Sweet correctly characterized *forum non conveniens*, especially in this context, both the Fifth Circuit and the Ninth Circuit approached the issue that way. Compare 821 F.2d at 1161-62 and 305 F.3d at 997-99. The Fifth Circuit effectively decided that paragraph (2) provides that whatever happens procedurally, once the action has been brought in a forum available under paragraph (1), is authorized under the Warsaw Convention, even if that procedural move undoes what paragraph (1) provides. This effectively transfers the venue option to the carrier. The Ninth Circuit took things the opposite way, holding effectively that, since the four fora are carrier-oriented, the choice of forum is left to the plaintiff, and it is improper for local procedural rules to interfere with that choice, since the Convention provides specifically for it.

This is exactly the ambiguity that the Ninth Circuit identified, and which petitioners deride. Contrary to what petitioners suggest, the Ninth Circuit did not mysteriously find something that had escaped everyone else's attention. Rather, in 1999, two courts – the British Court of Appeal and the Southern District of New York – took the relationship between Article 28(1) and 28(2) in exactly opposite ways. 305 F.3d at 994-95. The Ninth Circuit correctly identified this as an ambiguity that, contrary to what Judge Sweet concluded in the TWA 800 case, authorized an examination of extraneous factors, such as the drafting history and subsequent developments. Compare 305 F.3d at 996 and 65 F.Supp.2d at 214.

The ambiguity is not, as Judge Sweet noted, facial but only arose from attempts to reconcile the clear mandate of Article 28(1) with the doctrine of *forum non conveniens*. There is no middle ground: either the plaintiff's choice of forum must remain undisturbed, despite any local procedural rules that might otherwise allow for it to be changed at the behest of the defendant; or paragraph (2) somehow silently revokes and nullifies paragraph (1). Thus, the Ninth Circuit, after carefully and fully considering all the evidence, concluded that it is inconsistent with the Warsaw Convention to allow paragraph (2) to nullify paragraph (1). That this is contrary to the Fifth Circuit's conclusion, which depended solely on the usefulness of *forum non conveniens*, as well as its fear that disallowing dismissal would turn the United States into the world's forum of choice, is the sort of progress that is characteristic of the law.

The Ninth Circuit was right to perform the analysis it performed, in view of the ambiguity in Article 28 that, thanks to events in 1999, became apparent. The conclusion, that Article 28(2) cannot embrace dismissal for *forum non conveniens*, is well-supported and consistent with this Court's own commands to lower courts. On that basis, the Ninth Circuit's opinion should not be disturbed.

There is another, broader reason for not disturbing the Ninth Circuit's conclusion. Since the Fifth Circuit reached its different conclusion in 1987, this Court has repeatedly emphasized the importance of the two goals of the Warsaw Convention, which are uniformity and balancing the interests of carriers and passengers. *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 169-70 (1999).

Petitioners seek to make much of the Warsaw Convention's purpose, but, since they ignore what this Court said in *Tseng*, *supra*, and *Zicherman v. Korean Airlines Co., Ltd.*, 516 U.S. 217 (1996), their argument fails. According to petitioners, the "primary purpose" of the Convention was to limit air carrier liability. Petition at 12 (citing *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 546 (1991).) While that was certainly a purpose of the Convention's drafters, it is the clear lesson of this Court that, juridically, the Convention must be construed in such a way as to preserve its uniform international scheme while balancing the interests of both carriers and passengers.

The Ninth Circuit took this to heart. It is eminently consistent with the overarching goal of international uniformity to consider what sister-signatories have done in considering the question of whether *forum non conveniens* applies to Warsaw Convention cases. That is why the British Court of Appeal's rejection of the doctrine in *Milor S.R.L. v. British Airways PLC*, [1996] Q.B. 702 (1996) is helpful in pointing up the ambiguity of Article 28(1) and 28(2). It is also eminently consistent with the overarching goal of international uniformity to consider what civil law countries think of an attempt to impose this common law doctrine on the international scheme, as the Ninth Circuit did in looking at both the drafting history and postratification developments.

The results of the two cases petitioners cite are a stark example of precisely why, to serve the internatic nal uniformity that this Court has correctly identified as the Warsaw Convention's overarching goal, the Ninth Circuit's decision is exactly right. Under the approach of the Fifth Circuit, as followed, for different reasons, by Judge Sweet in the TWA 800 litigation, a district court is not deprived

of *forum non conveniens* after a plaintiff has exercised one of the options under Article 28(1). Thus, in both those cases, the court went on to decide whether, under the factors of *Gulf Oil Co. v. Gilbert*, 330 U.S. 501 (1947), the motion to dismiss should be granted. In both cases, the motion to dismiss was denied. In the present case, the district court granted the motion. In each case, the defendant was a United States carrier. In each case, the plaintiffs whose dismissal was sought were citizens of other countries. In each case, the substantive law was the Warsaw Convention.

There is one difference between the Fifth Circuit case and TWA 800 on one hand and the present case: in the first two, the accident occurred on United States territory, while the accident in the present case occurred over international waters during a flight between Japan and Hawaii. That the accident occurred in the United States clearly weighed in favor of denying the motion, especially in Judge Sweet's opinion. 65 F.Supp.2d at 217.

However, there was another, more telling issue, which Judge Sweet stated:

> If Defendants were not willing not to contest liability as to compensatory damages, the motion would not require serious consideration. It would not be necessary to consider the public interest factors, because the private interest factors would themselves weigh heavily against dismissal.

65 F.Supp.2d at 218. In the TWA 800 case, as part of the motion, the defendants had expressly waived liability. That is exactly the opposite of what petitioners here did. Despite their repeated references, below and here, to this

as a "damages only" case, in fact they never waived the Article 20 affirmative defense of "all necessary measures," nor, of course, were they willing to waive the Article 21 defense of the passenger's contributory negligence. *See, e.g.*, Petition at 2-3 (characterizing the turbulence as "unexpected" (cf. 305 F.3d at 993); alleging that the only evidence the plaintiffs below would have to offer would be limited to damages information; mentioning that some of the passengers were not wearing seatbelts). Thus, under Judge Sweet's own criteria, petitioners' motion to dismiss would also have been denied. That was not the case before Judge Jenkins in the Northern District of California.

It can hardly serve the goal of international uniformity if two district court judges, faced with substantially similar cases, can come to opposite conclusions on very broad and unpredictable grounds. This is especially so when one of the judges would clearly have decided the case the opposite way, based on his own reasoning a couple of months before. The Ninth Circuit explained why this result is even possible. It also reached the only conclusion that makes any sense under the circumstances, which is to hold that, in Warsaw Convention cases, *forum non conveniens* cannot apply.

The Warsaw Convention is a treaty, entered into by the Executive Branch and ratified by the Senate. Part of the treaty obligation includes providing jurisdiction to settle disputes under the Convention when the United States is properly one of the four fora under Article 28. These rules were carefully worked out by the drafters and clearly do not provide for random, unpredictable and subjective denials of such a forum, based on how a particular judge weighs the *Gilbert* factors on a given day.

International travel necessarily involves carriers from one country and passengers from other countries. Given the plain fact that the Article 28 fora are more favorable to the carrier than to the passenger (for example, the drafters did not include either the site of the crash or the passenger's domicile among the acceptable fora), it is inescapable that suit may be brought in the carrier's home forum by foreign plaintiffs. That was the case here.

Petitioners incorrectly argue to this Court that the uniformity of the Warsaw regime calls for transferring such cases to the plaintiff's home forum – despite the drafters' choice not to include the passenger's domicile among the Article 28(1) fora – on the specious ground that the central issue is access to proof of damages. Petition at 12-14. Petitioners thereby mistake the purpose of the Convention. The Convention is intended to determine the appropriate basis for carrier liability in the event of an aviation accident where the law of a single nation would not automatically apply. As this Court has ruled, the measure of damages, under Article 28(2), is left to the law of the forum (as determined by the appropriate choice of law analysis, a point Petitioners also leave to one side). *Zicherman v. Korean Airlines Co., Ltd.*, 516 U.S. 217 (1996). As the Convention itself states, it was drafted because the High Contracting Parties recognized "the advantage of regulating in a uniform manner the conditions of international transportation by air in respect of the documents used for such transportation and of the liability of the carrier." Warsaw Convention, preamble. This is the uniformity recognized by this Court, and it is the uniformity that the Ninth Circuit sought to preserve in its opinion.

Petitioners, for their part, urge this Court that the appropriate uniformity analysis is narrower. For Petitioners,

the only issue in a Warsaw Convention case seems to be damages. That is not true, and it is especially not true in this case, since Petitioners never waived liability in the district court.

For all these reasons, the Ninth Circuit opinion was right on the merits and should not be disturbed.

CONCLUSION

Petitioners are wrong to argue to this Court that the issue presented is one of recurring importance on which the circuits are split; the split is largely one manufactured by Petitioners. At the very least, this Court should allow the issue to come up again in other circuits before accepting it for review, if that should prove necessary.

More importantly, contrary to what Petitioners argue, the Ninth Circuit was right on the merits. Its decision carefully followed this Court's own principles of construing the Warsaw Convention, and it specifically sought to preserve the overarching goal of the Convention, which is international uniformity. Petitioners urge a different, narrower and new sort of uniformity on this Court, one which the drafters never intended.

On this basis, this case does not merit review by this Court. Respondents respectfully urge that this Court deny the petition.

Dated: January 16, 2003

Respectfully submitted,

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